No. 80-2220

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In The

Supreme Court of the United States

October Term, 1980

MARITIME OVERSEAS CORP.,

Petitioner,

vs.

STEWART V. DIXON,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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COUNTERSTATEMENT OF QUESTION PRESENTED

Petitioner's brief misstates the nature of the legal issues sought to be reviewed. These issues are whether petitioner's charges of alleged misconduct as a result of "bias" on the part of the trial judge and failure to disqualify himself pursuant to 28 U.S.C. §455(a) and/or §455(b)(1), were established as a matter of fact in the record. The Court of Appeals, in an informal

decision, did determine that in addition to appellant's failure to timely raise the disqualification argument, the record failed to reveal any "extra-judicial bias" or misconduct on the part of the trial judge.

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COUNTERSTATEMENT OF THE CASE

Petitioner has neglected to point out that after the denial of a petition for rehearing on March 16, 1981, by the Court of Appeals, a mandate was filed on April 1, 1981, in the District Court. Petitioner then sought unsuccessfully to obtain a stay of execution in the Court of Appeals. Mr. Justice Marshall also denied a stay on April 10, 1981.

The judgment, together with appropriate interest, was paid in full and a satisfaction piece was filed in the District Court on April 22, 1981. Judge Cooper (upon consent of the parties) on May 20, 1981, ordered a supersedeas bond covering the judgment on appeal to be cancelled.

ARGUMENT

Despite the spilling of a great deal of ink by resourceful counsel, the arguments raised in the petition that petitioner shipowner was deprived of a fair trial because of "extra-judicial personal bias of the trial judge" are without substance or basis in the record. Petitioner not only has engaged in a strained interpretation of the judicial disqualification statutes, but has entered a realm of sheer speculation concerning the thought processes of a trial judge. After thoroughly reviewing the record, the Court of Appeals rejected petitioner's arguments and unanimously affirmed.

We also find that the deportment and statements of petitioner's counsel were such as to draw appropriate responses at various stages of the trial from the court, as shown in the record, since "a judge is not wholly at the mercy of counsel . . ." *Ballantine Books Co., Inc. v. Capital Distributing Co.*, 302 F. 2d 17 (1962). Furthermore, there was a direct holding by the Court of Appeals that petitioner had been guilty of laches in seeking

recusal of the trial judge. Nevertheless, after a total examination of the record on appeal, the court below dismissed the charges of bias. There was a further finding by the Court of Appeals that during the cross-examination of Dr. Seaman defense counsel had brought reproof upon himself when the trial judge instructed the court reporter to "Strike the insolence of counsel."

Petitioner's neglect to file its trial memorandum in connection with the "Jones Act" portion of the case was not only never fully explained, but the answers evinced by its counsel can be considered provocative as well as evasive.

> "Mr. Stearns: What the fact is I am not entirely sure but it seems it was simply forgotten."

and

> ". . . of course, you must admit, and I will admit this, I am sure you know it well, there are instances that I for one and perhaps others do not agree that your approach or your choice of treatment of a particular situation is what we would do had we the exalted position that you have."

In any event, the proof was overwhelming in this classic case of unseaworthiness where a handle used in connection with the operation of a butterworthing reel broke away because of a latent defect, and its jagged stub then spun and struck respondent's left knee with resultant injury. The case absorbed much time (January 7, 8, 9, 10, 14 and 15, 1980), and both sides were afforded every opportunity by the trial judge to present their proofs. We submit that the bitter disappointment of petitioner's counsel with the jury's verdict precipitated his attack on the trial

judge, alleging judicial misconduct. On the other hand, one finds said counsel had violated the local rules (Appendix G2 [General Rule 9(m)]) by filing an affidavit without leave of court in connection with his motion for reargument. In this manner, he sought to improperly expand the record on appeal.

One looks in vain for reversible error in this case. We submit that a reexamination of these proceedings would not only run counter to the "usual rule of this Court's non-interference where conclusions of circuit courts of appeals depend on appreciation of circumstances that admit of different interpretations" (*see N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503, citing *Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543, 544), but would also be a fruitless search that would not serve either the time or best interests of this Court.

It is also respectfully submitted that petitioner has failed to present a semblance of a case which is of importance to the public as distinguished from the parties, or where there exists a conflict between the various courts of appeals. *See N.L.R.B. v. Pittsburgh Steamship Co., supra.* No special, significant or important reasons exist in the instant case which would justify granting a writ of certiorari. It is well established that a problem which is only academic or episodic in nature does not meet the necessary criteria for review, as pointed out in *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74:

> "But this Court does not sit to satisfy scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants."

Petitioner has had its day in court; exhausted all rights to appeal; and can ask no more of our judicial system.

CONCLUSION

For the reasons stated above, respondent prays that the petition for a writ of certiorari should be denied.

Respectfully submitted.

MAX COHEN
Attorney for Respondent